

United States  
Court of Appeals  
for the Ninth Circuit

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THE FIRST NATIONAL BANK OF PORT-  
LAND, a National Banking Association,  
Appellant,

vs.

FRANK A. DUDLEY, Trustee in Bankruptcy of  
the Estate of Northwest Variety Wholesale,  
Inc., Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
District of Oregon

FILED

OCT 11 1955

PAUL P. O'BRIEN, CLERK



No. 14837

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Court of Appeals  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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Portland, Oregon,

For Appellant.

EDWARD A. BOYRIE,

Pittock Block,  
Portland, Oregon,

For Frank A. Dudley, Trustee in  
Bankruptcy, Appellee.





In the District Court of the United States for the  
District of Oregon

No. B-33752

In the Matter of the Petition of NORTHWEST  
VARIETY WHOLESALE, INC., Bankrupt.

CLAIM OF THE FIRST NATIONAL BANK  
OF PORTLAND—Amount \$8,184.19

State of Oregon,  
County of Multnomah—ss.

Oscar H. Keller, of Portland, in the County of  
Multnomah, State of Oregon, being duly sworn,  
deposes and says:

That he is the Executive Vice President and  
Cashier of The First National Bank of Portland,  
a national banking association, with its principal  
place of business at Portland, County of Multno-  
mah, State of Oregon, and is duly authorized to  
make this proof of claim on its behalf.

That Northwest Variety Wholesale, Inc., the  
above named bankrupt, was at and before the filing  
by it of the petition for adjudication of bankruptcy,  
and still is, justly and truly indebted to said cor-  
poration in the sum of \$8,184.19.

That the consideration of said debt is as follows:  
money loaned to said bankrupt and evidenced by a  
certain promissory note in the original amount of  
\$22,000, which note is attached hereto and by this  
reference incorporated herein. Request is made for

permission to withdraw said original note and substitute a photostatic copy thereof.

That nothing has been paid to apply upon the said debt, except \$11,000 principal and interest to May 26, 1953, on and prior to said date and the further sum of \$73.33 interest and \$2,815.81 principal on July 13, 1953 by exercise on that date of claimant's right of set off against the commercial account of said bankrupt maintained subject to check by said bankrupt in the regular course of its business; that there are no set offs or counterclaims to said debt.

That said corporation does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received any security or securities for said debt.

/s/ OSCAR H. KELLER

Subscribed and sworn to before me this 29 day of July, 1953.

[Seal]            /s/ C. E. ZOLLINGER,  
Notary Public for Oregon

[Endorsed]: Filed August 4, 1953.





[Title of District Court and Cause.]

TRUSTEE'S OBJECTIONS TO ALLOWANCE  
OF CLAIM OF THE FIRST NATIONAL  
BANK OF PORTLAND AND PETITION  
FOR ORDER OF PAYMENT OF BANK  
ACCOUNT OF TRUSTEE, AND ORDER  
SETTING TIME FOR HEARING THERE-  
ON

Comes now Frank A. Dudley, the duly appointed, qualified and acting Trustee of the estate of the above named bankrupt, and objects to the claim of The First National Bank of Portland filed herein as Claim No. 17 in the amount of \$8,184.19, on the following grounds:

1. On October 11th, 1952, the bankrupt executed and delivered to claimant its promissory note in the amount of \$22,000.00 payable thirty days after date with interest at the rate of 5%. Copy of said note is attached to claimant's claim herein.

2. During the month of November, 1952, the bankrupt was unable to meet its obligations in the regular course of business as they became due and was pressed by many of said creditors for payment of their accounts and was threatened by certain of said creditors with legal proceedings in the event of nonpayment of said accounts. The bankrupt conferred with and wrote to its creditors during the month of December, 1952, and advised said creditors substantially as follows: That in the Spring of 1952, upon the advice of a national firm of business consultants, it had increased its inventory far beyond its past normal business requirements;



that the promised sales promotion was not subsequently realized and that it found itself in the embarrassing position of having a much greater inventory than could be readily liquidated; that this was so because much of the inventory was in seasonal merchandise which would not be liquidated in an orderly manner in less than a full year's business cycle; that if the inventory had to be quickly liquidated considerable of it would have only salvage value; that its financial position was sound only so long as its inventory could be sold in a normal manner. The bankrupt at said time advised its said creditors that if permitted to continue operation it would liquidate all excess inventory in this manner and would pay all creditors in ten equal monthly installments, starting with January 15, 1953.

3. The foregoing circumstances and plan were imparted to and discussed by the bankrupt with claimant, The First National Bank of Portland, and the said bank agreed with the feasibility and advisability of putting the same into effect and agreed to accept the payments of ten per cent per month starting with January 15th, 1953, upon its promissory note. Other creditors of the bankrupt signified similar acquiescence and the said plan was put in effect. The bankrupt proceeded to liquidate its excess stock of merchandise and placed all monies realized from the sale thereof in its bank account at The First National Bank of Portland. The bankrupt drew checks upon said bank account and made payment to its creditors upon a pro-rata

basis of ten per cent of their respective accounts per month during the months of January, February, March, April and May, 1953. The claimant received and accepted its ten per cent monthly payments during said five months, which said payments are shown upon the copy of note attached to claimant's claim herein, and reduced the principal amount of said note to \$11,000.00. Other creditors of the bankrupt accepted like pro-rata payments and refrained from instituting any action against bankrupt for collection of their respective accounts.

4. At the time of the commencement of the within proceedings the bankrupt had on deposit in said bank account at The First National Bank of Portland the sum of \$2,815.81, which said sum the said bank then claimed the right to appropriate and set off against the unpaid balance of said note, thereby reducing the amount of same to \$8,184.19, in which amount the said bank has filed its claim herein.

5. Trustee asserts that the seizure of the balance of bankrupt's bank account in the amount of \$2,815.81 and the application of said amount upon the indebtedness owing to the bank was without legal right on the part of said bank and a misappropriation of monies payable to the Trustee, and that the Trustee is entitled to recover payment thereof of and from the said bank; that the bank had so dealt with the depositor as to waive or be estopped to assert its right of set-off which would otherwise exist; that the circumstances under which the bank account was created and the knowledge,

acquiescence and cooperation of the bank in the manner and purpose of the creation of said fund for the payment of creditors upon a pro-rata basis estopped the bank to assert a lien thereon, or the right of set-off for its own benefit.

Wherefore, Trustee prays that a time may be set for hearing of the foregoing objections and petition, and that upon hearing thereof the claim of said The First National Bank of Portland may be disallowed, unless, within a time to be set, the said bank shall pay over to the Trustee the said sum of \$2,815.81 appropriated by it from the bank account of the bankrupt as above set forth, and that the Trustee do have judgment against said bank for payment to the Trustee of said amount, and for such other, further and different relief as may be meet and equitable in the premises.

/s/ FRANK A. DUDLEY,  
Trustee.

Duly Verified.

### Order Setting Time for Hearing Thereon

Upon application of Edward A. Boyrie, of Attorneys for Trustee, and no adverse interests appearing;

It Is Ordered that the foregoing objections and petition be heard before the undersigned Referee of the above entitled Court in his court room, 512 United States Court House, Portland, Oregon, on the 13th day of September, 1954, at the hour of 2:00 o'clock p.m.



It Is Further Ordered that service of the within objections and order setting time for hearing thereon be made by mailing a copy thereof to The First National Bank of Portland, Main Branch, Attention Clifford E. Zollinger, S. W. Fifth, Sixth and Stark Street, Portland, Oregon.

Dated this 13th day of August, 1954.

/s/ ESTES SNEDECOR, Referee

### MEMORANDUM

The Trustee contends that the facts of this case as they will be disclosed by evidence to be submitted by Trustee and claimant are such as bring the instant case within the rule laid down by the U. S. Court of Appeals, Ninth Circuit, in the case of Union Bank & Trust Company of Helena, Montana, vs. Lester H. Loble, Trustee, 20 F.(2d) 124, 10 A.B.R. (N.S.) 350.

The following is quoted from the case referred to:

"But a bank may so deal with a depositor as to waive or be estopped to assert the right of set-off. *Michie, Banks and Banking*, 1027. And the right does not exist where the circumstances are inconsistent with its exercise. *Neponset Bank vs. Leland*, 5 Metc. (Mass.) 259; *Reynes vs. Dumont*, 130 U.S. 354, 9 S. Ct. 486, 32 L. Ed. 934. Nor where the principles of legal or equitable set-off do not authorize it. *Wagner vs. Citizens' Bank & Trust Co.*, 122 Tenn. 164, 122 S. W. 245, 28 L.R.A. (N.S.) 484, 135 Am. St. Rep. 869, 19 Ann. Cas. 483; *Furber vs. Dane*, 203 Mass. 108, 89 N. E. 227; *Lyman vs. Bel-*

fast Nat. Bank, 98 Me. 448, 57 A. 799; *In re Davis* (D. C. Tex.), 9 Am. B. R. 670, 119 F. 950. On these grounds we think the decision of the court below is sustainable. While the money realized on the special sale and deposited to the bankrupt's current account and subject to its checks for general purposes may not be said to come within the accepted definition of a special deposit so as to be exempt from the bank's claim to the right of set-off, we are inclined to the view that the circumstances under which the fund was created, and the co-operation of the bank and the bankrupt in its creation, were sufficient to so far impress upon it the character of a trust fund that the bank should be held estopped to assert a lien thereon or the right of set-off.

Applicable to the case is the language of the court in *Union Trust Co. vs. Peck* (C.C.A., 4th Cir.), 9 Am. B. R. (N.S.) 127, 16 F.(2d) 986:

'It is, moreover, to be noted that, before and at the time the bank applied these amounts to its own use, it, the bankrupt, and the other creditors were conferring as to the possibility of keeping the bankrupt upon its feet as a going concern by securing the general acceptance of a scheme of reorganization which contemplated the creditors taking less than was due them. Under such circumstances the deposit by the bankrupt of large sums in the bank, which both it and the bankrupt intended should be used for the reduction of the former's debt, were obviously not made in ordinary course, in any fair sense of that phrase. Most men would feel that it is

an implied term of such negotiations that during their pendency nobody taking part in them shall do anything to secure preferential rights in or over any assets of the bankrupt which did not belong to it when the conferences began, or upon which it did not then have a prior lien.' ”

Respectfully submitted,

/s/ EDWARD A. BOYRIE,  
Attorney for Trustee.

[Endorsed]: Filed August 13, 1954.

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[Title of District Court and Cause]

ANSWER TO TRUSTEE'S OBJECTIONS TO  
ALLOWANCE OF CLAIM OF THE FIRST  
NATIONAL BANK OF PORTLAND

Comes now The First National Bank of Portland, a national banking association, claimant herein, and in answer to the Trustee's Objections to the allowance of its claim admits, denies and alleges as follows:

1. Admits Paragraph 1 of Trustee's said Objections.

2. In answer to Paragraph 2 of Trustee's said Objections, admits that it was requested by the Bankrupt to enter into an agreement to accept payments of not less than ten per cent of the obligation owing it, the first payment to be made in January, 1953, and a like payment to be made each month thereafter for ten consecutive months or until the full balance owing had been paid; denies

that it received the letter to which reference is made in Paragraph 2 at line 21 of said Objections or any letter of similar import, and denies having knowledge or information sufficient to form a belief as to the truth of the allegations made in Paragraph 2 of said Trustee's Objections, except as hereinabove admitted.

3. In answer to Paragraph 3 of said Objections, denies that it agreed to accept payments of ten per cent of the obligation owing it by the Bankrupt, the first payment to be made in January, 1953, and a like payment in each month thereafter for ten consecutive months or until the full balance owing was paid; admits that it received and accepted payments in the aggregate amount of \$11,000.00 to apply upon the principal balance owing it, composed of five equal payments of \$2200.00 each, and that the principal amount of the obligation owing it was reduced to \$11,000.00; and denies having knowledge or information sufficient to form a belief as to the truth of the allegations contained in said Paragraph 3 except as hereinabove admitted.

4. Answering Paragraph 4 of said Objections, admits the allegations therein contained.

5. Answering Paragraph 5 of said Objections, denies each and every allegation, statement, matter and thing therein contained, generally and specifically, and the whole thereof.

As affirmative matter and in explanation and support of its right of set-off herein, The First National Bank of Portland, creditor herein, alleges:



1. In the latter part of December, 1952, Mr. D. E. Ankron, Manager of the Bankrupt, advised the Bank that the Bankrupt was being pressed for payment by its creditors and asked if the Bank would agree to accept not less than ten per cent of the obligation owing it, the first payment to be made in January, 1953, and like payments of not less than ten per cent of the principal amount of the obligation, or \$2200.00, each month thereafter until the full amount owing was paid. Mr. Ankron advised the Bank that the Bankrupt was making the same request of each of its creditors.

The Bank refused to agree to the proposal as advanced by Mr. Ankron, but it did state that it would accept the proposed payments on a month to month basis, reserving all of its rights and remedies against the Bankrupt, and particularly the right to take such action at any time as it might deem appropriate to effect the full collection of the obligation owing it.

2. In December, 1952, the note of the Bankrupt payable to the order of The First National Bank of Portland, a photostatic copy of which is in the files of this matter, was in default, due, owing and unpaid.

3. On or about July 2, 1945, the Bankrupt, then Northwest Buyers, Inc., duly, regularly and by appropriate resolution, opened a commercial account at the Industrial Branch of The First National Bank of Portland, which said account was maintained by it and continually used by it until on or about July 9, 1953. During the latter half of De-

cember, 1952, the balance of said account ranged from \$16,114.98 to \$22,301.09. The Bank could have exercised the right to set off the amount in the said commercial account of the Bankrupt against the sums owing the Bank at any time after November 12, 1952, at which time the above described promissory note was in default, due, owing and unpaid.

4. On July 7, 1953, The First National Bank of Portland was advised that the Bankrupt was preparing and would file a voluntary petition in bankruptcy. Thereafter the Bank exercised its right of set-off of the sum of \$2815.81 against the sum of \$11,000.00 then due and owing from the Bankrupt.

Wherefore, The First National Bank of Portland prays that the Trustee's Objections to the allowance of its claim herein be dismissed, that its claim as hereinabove filed be allowed, and that its exercise of its right of set-off in the amount of \$2815.81 against the balance owing to it at the time of the set-off be confirmed.

THE FIRST NATIONAL BANK  
OF PORTLAND,

/s/ By C. E. ZOLLINGER,

Vice President.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed September 3, 1954.

[Title of District Court and Cause.]

## ORDER DISALLOWING CLAIM

The within matter came on for hearing before the undersigned Referee of the above entitled Court on the 13th day of September, 1954, upon trustee's objections to allowance of claim of The First National Bank of Portland and the answer of The First National Bank of Portland thereto. Trustee appeared by his attorney, Edward A. Boyrie, and claimant, The First National Bank of Portland, appeared by W. H. Pendergrass of Messrs. Pendergrass, Spackman and Bullivant, its attorneys. Witnesses were sworn and testified, and documentary evidence introduced and received. After consideration of said evidence, and written and oral argument on behalf of the trustee and of said claimant, the Court being fully advised in the premises finds:

1. That on October 11th, 1952, the bankrupt executed and delivered to claimants its promissory note in the amount of \$22,000.00 payable 30 days after date with interest at the rate of five per cent, copy of which note is attached to claim of The First National Bank of Portland filed herein as Claim No. 17 in the amount of \$8,184.19.

2. That during the months of November and December, 1952, the bankrupt was indebted to The First National Bank of Portland in the principal amount of said promissory note together with the interest thereon, and The First National Bank of

Portland was at said time the largest creditor of the bankrupt.

3. That during the month of November, 1952, the bankrupt became unable to meet its obligations in the regular course of business as they became due, and by its president and its attorney advised said bank that it found itself in this condition, but that it had a stock of merchandise which could be sold to advantage over a period of time so as to liquidate the indebtedness owing by the bankrupt corporation; that the bankrupt proposed to said bank that if the creditors, including said bank, would refrain from seeking immediate payment of their respective accounts in full, the bankrupt would proceed to liquidate its inventory over a period of twelve months time and would pay to the bank, as well as to other creditors, a quarterly payment of twenty-five per cent of the indebtedness owing to the bank and to such creditors, the first of said payments to be made on January 15th, 1953.

4. That the bank proposed a modification in said plan whereby, instead of quarterly payments of twenty-five per cent over a twelve months period of time, monthly payments of ten per cent would be made to creditors commencing with the month of January, 1953.

5. That as so modified, the bank agreed that the plan was a feasible one, which should enable the bankrupt to work out of its financial difficulties, and that the bank would go along with the bankrupt on the plan and refrain from pressing for



immediate payment in full of the indebtedness due it, providing that the monthly payments of ten per cent were made.

6. That the bankrupt advised its other creditors of said plan and advised a number of said creditors of the approval of said plan by the bank and the participation of the bank therein, and obtained the participation of its other creditors in said plan, with the result that the bankrupt was permitted to continue in business and proceeded to liquidate its inventory in accordance with the plan, and to make the ten per cent payments monthly to each of its creditors during the months of January, February, March, April and May, 1953.

7. That in 1946 the bankrupt opened with The First National Bank of Portland a general commercial account in which unrestricted deposits were made subject to withdrawal by check in the ordinary course of business. This account was in existence at the time of the creation of the loan upon which the claim of the bank is based and continued in existence without change, except as to the amount thereof, to and including the date of the exercise by said Bank of its asserted right of off-set. The activity in the account and the high and low monthly balances for the period from January, 1951 through June, 1953, are shown in Exhibit 5, which is included by reference herein as a part hereof. The deposits in and withdrawals from the account and the balances after each daily transaction in the account for the period of from November 29, 1952,

until the account was closed, are shown in the copies of the bank statements which are Exhibit 6, and which is included by reference herein as a part hereof. After the formulation of the plan referred to in paragraphs 2, 4, 5 and 6 above, the bankrupt deposited all monies realized from the sale of its inventory in its bank account at The First National Bank of Portland and drew checks upon said bank account in payment of its operating expenses and made payment to its creditors by checks upon said bank account, upon a pro-rata basis of ten per cent of their respective accounts during the months of January, February, March, April and May, 1953. During said period the bank had knowledge that the plan was in progress, that the bankrupt was operating thereunder, and that all of the creditors of the bankrupt had acquiesced in said plan and were receiving their monthly ten per cent dividends thereunder. At the time of the commencement of the within proceedings there remained in said bank account a balance resulting from said deposits in the amount of \$2,889.14.

8. That the claimant, The First National Bank of Portland, received and accepted monthly payments of ten per cent of the principal of its note together with accruing interest in full during said five months, which said payments are shown upon the copy of said note attached to claimant's claim herein, and reduced the amount of said note to \$11,000.00; that the other creditors of the bankrupt received and accepted monthly payments of ten per

cent of their accounts, reducing their respective claims accordingly.

9. On June 20th, 1953, the bank received information indirectly that the debtor company, Northwest Variety Wholesale, Inc., was considering bankruptcy. On July 7th, 1953, counsel for the bankrupt advised the bank that he was preparing a petition in bankruptcy to be filed as soon as the inventory could be completed. The petition in bankruptcy was filed on July 13th, 1953, at which time the bankrupt had on deposit in its said account at The First National Bank of Portland the sum of \$2,889.14. On July 14th, 1953, the bank offset this amount against its indebtedness, thereby reducing the amount of same to \$8,184.19, in which amount the said bank has filed its claim herein; that other creditors of the bankrupt have filed their claims herein covering the balances due them after application of the five monthly payments of ten per cent as made to them under the plan of liquidation above referred to.

Upon the foregoing findings the Court concludes:

1. That by its approval of the bankrupt's plan of payment of its creditors upon a pro-rata basis and by its participation therein, the bank so dealt with its depositor, the bankrupt, and with other creditors of the bankrupt as to waive or be estopped to assert the right to set off of the deposits made by the bankrupt against the indebtedness owing to the bank.

2. That the bank account of the bankrupt as it existed at the time of the commencement of the within bankruptcy proceedings was created under such circumstances, with the cooperation of the bank and the bankrupt, as to so far impress upon it the character of a trust fund, that the bank should be estopped to assert a lien thereon or the right of set off.

3. That the claim of The First National Bank of Portland, as filed herein, should be disallowed unless the said sum of \$2,889.14, appropriated by said bank from the bank account of the bankrupt, be surrendered to the Trustee.

Now, Therefore, It Is Ordered that the claim filed herein by The First National Bank of Portland in the amount of \$8,184.19 be, and the same is hereby disallowed, unless said The First National Bank of Portland surrender and pay over to said trustee the sum of \$2,889.14 within twenty days from the date hereof.

Dated this 15th day of February, 1955.

/s/ ESTES SNEDECOR,  
Referee in Bankruptcy.

[Endorsed]: Filed Feb. 15, 1955.

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S  
ORDER BY JUDGE

Petitioner is a creditor of the above named bankrupt and has filed its claim herein in the amount of \$8,184.19.

On August 13, 1954, Frank A. Dudley, Trustee of the estate of the above named bankrupt, filed his objections to the allowance of the claim of Petitioner and requested an order setting the time and place for the hearing of said objections. The objections came on for hearing on September 13, 1954, Trustee appearing by his attorney, Edward A. Boyrie, and Petitioner appearing by Walter H. Pendergrass, of Pendergrass, Spackman & Bullivant, its attorneys. Thereafter on February 15, 1955, findings of fact and conclusions of law were filed and an order disallowing Petitioner's claim was entered, a copy of which findings of fact, conclusions of law and order is attached hereto and by this reference made a part hereof.

The order is erroneous for the following reasons:

1. The conclusion of law that the Bank waived its right to assert a set-off of the balance in the bankrupt's account against the bankrupt's indebtedness owing the Bank is not supported by the facts and is contrary to law.

2. The conclusion of law that the Bank so conducted itself as to be estopped to assert its right to



set-off the balance in the bankrupt's account against the indebtedness owing the Bank is not supported by the facts and is contrary to law.

3. The conclusion of law that the bank account maintained by the bankrupt with the Bank had, at the time of the exercise of the right of set-off, acquired the character of a trust fund and was therefore not available by the Bank to be set off against the bankrupt's indebtedness owing it is not supported by the facts and is contrary to law.

4. The conclusion of law that the claim of the Bank should be disallowed unless the sum of \$2,-889.14, which is the sum set off by the Bank against the bankrupt's indebtedness owing it, is surrendered to the Trustee is not supported by the facts and is contrary to law.

5. The evidence presented to the Referee, as disclosed by the transcript and exhibits in this matter, and the facts as found by the Referee, establish that the Bank was authorized by the applicable statutes and the cases construing the same to set off the balance in the general commercial account maintained by the bankrupt with the Bank against the indebtednesses owing by the bankrupt to the Bank.

Wherefore, Petitioner prays for a review of the said order by the Judge and that the said order be vacated and set aside, and for an order approving and allowing Petitioner's claim heretofore filed herein and confirming Petitioner's right to set off the balance in the general commercial account maintained by the bankrupt with the Bank on July 14,

1953, against the indebtedness owing by the bankrupt to the Bank.

THE FIRST NATIONAL BANK  
OF PORTLAND,

Petitioner,

/s/ By C. E. ZOLLINGER,  
Vice President.

[Order Disallowing Claim set out at pages 17-22  
of this printed record.]

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed Feb. 23, 1955.

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[Title of District Court and Cause.]

CERTIFICATE OF REFEREE ON PETITION  
of The First National Bank of Portland for  
Review of the Referee's Order Entered February  
15, 1955, Disallowing the Claim of the Bank

To the Honorable Judges of the Above Entitled  
Court:

Estes Snedecor, the Referee in Bankruptcy in  
charge of this proceeding, hereby makes this his  
certificate on the petition of The First National  
Bank of Portland for a review of the Referee's  
order disallowing its claim unless the Bank shall  
surrender and pay over to the trustee the sum of  
\$2,889.14.

Questions Presented

The questions presented are set forth in the Peti-  
tion for Review which accompanies this certificate.

## Facts

The facts are undisputed and are set forth in the Referee's Order Disallowing the Claim of the Bank.

## Papers Submitted

Transmitted herewith are the following papers:

1. Claim of The First National Bank of Portland.
2. Trustee's objections to allowance of claim of The First National Bank of Portland and petition for order of payment of Bank Account to trustee, and order setting time for hearing thereon.
3. Answer to trustee's objections to allowance of claim of The First National Bank of Portland.
4. Memorandum of The First National Bank of Portland.
5. Reply memorandum.
6. Order disallowing claim of The First National Bank.
7. Petition for review of Referee's order.
8. Transcript of testimony of hearing before the Referee September 13, 1954.
9. Trustee's Exhibit 1 and Claimant's Exhibits 2, 3, 4, 5 and 6.

Dated at Portland, Oregon, this 1st day of March, 1955.

Respectfully submitted,

/s/ ESTES SNEDECOR,  
Referee in Bankruptcy.

[Endorsed]: Filed March 1, 1955.



[Title of District Court and Cause.]

## MEMORANDUM OF DECISION

Because I am not impressed as an original proposition that such a loose arrangement, as presented here, should work a loss of the bank's right of set-off, I have examined *Union Bank & Trust Co. vs. Loble*, 20 F.2d. 124 closely. The learned referee thought it was controlling; counsel for petitioner strongly urges that the present case and that case are distinguishable.

I do not feel that I should strain to distinguish the *Loble* case, and I will follow the view the referee took of it.

If, as appears to be the case, petitioner feels that the referee's decision (and my affirmance) will seriously affect banking practices, petitioner is in position to take the question to the Circuit Court. If that is done, I would suggest that the Circuit should not be limited, as the presentation before me was limited, to consideration only of the findings made by the referee.

Dated May 10, 1955.

/s/ CLAUDE McCULLOCH  
Judge.

[Endorsed]: Filed May 10, 1955.

In the United States District Court for the District  
of Oregon

In Bankruptcy—No. B-33752

In the Matter of NORTHWEST VARIETY  
WHOLESALE, INC., Bankrupt.

ORDER ON PETITION FOR REVIEW  
OF ORDER OF REFEREE

The within matter came on for hearing on the 26th day of April, 1955, upon petition of The First National Bank of Portland for review of Referee's Order made and entered in the within proceedings on the 15th day of February, 1955, disallowing petitioner's claim as filed in the within proceedings. Petitioner appeared by Walter H. Pendergrass of Pendergrass, Spackman & Bullivant, its attorneys, and Frank A. Dudley, trustee herein, appeared by his attorney, Edward A. Boyrie. The Court having heard argument of counsel and received and considered briefs filed herein, has heretofore under date of May 10th, 1955, found that the Order of the Referee should be sustained, and has filed its Memorandum of Decision herein;

Now, Therefore, It Is Ordered that the Order of the Referee made and entered in the within proceedings under date of February 15th, 1955, disal-

lowing the claim of The First National Bank of Portland, as filed in the within proceedings, be and the same is hereby affirmed.

Dated this 6th day of June, 1955.

/s/ CLAUDE McCULLOCH,  
Judge.

[Endorsed]: Filed June 6, 1955.

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[Title of District Court and Cause.]

NOTICE OF APPEAL TO  
COURT OF APPEALS

To: Frank A. Dudley, Trustee of the Bankrupt Estate of Northwest Variety Wholesale, Inc., a corporation, and Edward A. Boyrie, his attorney:

Notice is hereby given that The First National Bank of Portland, Claimant, hereby appeals to the Court of Appeals for the Ninth Circuit from that certain Order of the Honorable Claude McCulloch, Judge of the District Court of the United States for the District of Oregon in the matter of Northwest Variety Wholesale, Inc., Bankrupt, dated June 6, 1955, and reading as follows:

“Now, therefore, it is ordered that the Order of the Referee, made and entered in the within proceeding under date February 15th, 1955, disallow-

ing the claim of The First National Bank of Portland, as filed in the within proceedings, be and the same is hereby affirmed."

Dated this 23rd day of June, 1955.

V. V. PENDERGRASS,

R. R. BULLIVANT,

WALTER H. PENDERGRASS,

Attorneys for Claimant The First  
National Bank of Portland.

[Endorsed]: Filed June 23, 1955.

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[Title of District Court and Cause.]

### BOND FOR COSTS

Know All Men by These Presents: That The First National Bank of Portland, a national banking association, as Principal, and C. B. Stephenson, as Surety, are firmly held and bound unto Frank A. Dudley, Trustee of the Bankrupt Estate of Northwest Variety Wholesale, Inc., its successors and assigns, in the sum of Two Hundred Fifty 00/100ths Dollars (\$250.00) lawful money of the United States to be paid unto the said Frank A. Dudley, as Trustee, his successors and assigns, to which payment well and truly to be made we do bind and oblige our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this — day of May, 1955.

Whereas the above named Frank A. Dudley, Trustee, filed an objection to the allowance of the claim of The First National Bank of Portland in the United States District Court in and for the District of Oregon, in Bankruptcy,

Now, Therefore, the condition of this obligation is that if the above named The First National Bank of Portland in the said action shall pay on demand all costs that may be adjudged or awarded against it in said action, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

THE FIRST NATIONAL BANK  
OF PORTLAND,

/s/ By C. B. STEPHENSON,  
President,

/s/ By R. G. ALBERGER,  
Cashier,  
Principal,

[Seal] /s/ C. B. STEPHENSON,  
Surety.

State of Oregon,  
County of Multnomah—ss.

I, C. B. Stephenson, being first duly sworn, depose and say:

That I am a resident and freeholder of the State of Oregon and worth the sum of Five Hundred 00/100th Dollars (\$500.00) over and above all my

just debts and liabilities in property not exempt from execution.

/s/ C. B. STEPHENSON.

Subscribed and sworn to before me this 20th day of May, 1955.

[Seal]           /s/ W. H. PENDERGRASS,  
Notary Public for Oregon.

[Endorsed]: Filed June 23, 1955.

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[Title of District Court and Cause.]

### STIPULATION FOR DESIGNATION OF RECORD ON APPEAL

Frank A. Dudley, Trustee of the Bankrupt Estate of Northwest Variety Wholesale, Inc., by Edward A. Boyrie, his attorney, and The First National Bank of Portland, a national banking association, Claimant, by Walter H. Pendergrass, of its attorneys, do stipulate and agree that the following listed documents shall be and they are designated as the Record on Appeal herein.

1. Claim of The First National Bank of Portland.

2. Trustee's Objections to Allowance of Claim of The First National Bank of Portland and Petition for Order of Payment of Bank Account to Trustee, and Order Setting Time for Hearing Thereon, filed August 13, 1954.



3. Answer to Trustee's Objections to Allowance of Claim of The First National Bank of Portland, filed September 3, 1954.

4. Transcript of Testimony of Hearing of September 13, 1954.

5. Trustee's Exhibit 1 and Claimant's Exhibits 5 and 6.

6. Order Disallowing Claim filed February 15, 1955.

7. Petition for Review of Referee's Order by Judge filed February 23, 1955.

8. Certificate of Referee on Petition of The First National Bank of Portland for Review of the Referee's Order entered February 15, 1955, Disallowing the Claim of the Bank, dated March 1, 1955.

9. Memorandum of Decision of the Honorable Claude McCulloch, Judge of the District Court of the United States for the District of Oregon, dated May 10, 1955.

10. Order on Petition for Review of Order of Referee, dated June 6, 1955, signed by Honorable Claude McCulloch, Judge.

11. Notice of Appeal filed June 23, 1955.

12. Bond for Costs on Appeal filed June 23, 1955.

13. Stipulation for Designation of Record filed June 24, 1955.

14. Statement of Points on Appeal filed June 24, 1955.

This stipulation is submitted pursuant to Rule 75(f) of Federal Rules of Civil Procedure.

Dated this 23rd day of June, 1955.

/s/ WALTER H. PENDERGRASS,  
Of Attorneys for The First National  
Bank of Portland, Claimant,  
/s/ EDWARD A. BOYRIE,  
Attorney for Frank A. Dudley,  
Trustee

[Endorsed]: Filed June 24, 1955.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

United States of America,

District of Oregon—ss:

I, F. L. Buck, Acting Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing documents consisting of Claim of The First National Bank of Portland, Trustee's Objections to Allowance of Claim of The First National Bank of Portland, Answer to Trustee's Objections to Allowance of Claim, Trustee's Exhibit No. 1, Claimant's Exhibits Nos. 5 and 6, Order Disallowing Claim, Petition for Review of Referee's Order, Certificate of Referee on Petition for Review of the Referee's Order, Memorandum Decision of The Hon. Claude McColloch, Order of The Hon. Claude McColloch, Notice of Appeal, Bond on Appeal, Statement of Points on



Appeal and Stipulation for Designation of Record on Appeal, constitute the record on appeal from an order of said court in a certain bankruptcy cause therein numbered B-33752, In the Matter of Northwest Variety Wholesale, Inc., in which The First National Bank of Portland is appellant, and Frank A. Dudley, Trustee in Bankruptcy, is appellee; that the said record has been prepared by me in accordance with the stipulation for designation of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that I am sending with the said transcript of record a copy of the reporter's transcript of testimony dated September 13, 1954, and

I further certify that the cost of filing the notice of appeal is \$5.00 and that the same has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 15th day of July, 1955.

[Seal]                      F. L. BUCK,  
                                 Acting Clerk,  
/s/ By E. W. DAVIS,  
                                 Deputy Clerk.

In the District Court of the United States for the  
District of Oregon

In Bankruptcy—No. B-33752

In the matter of NORTHWEST VARIETY  
WHOLESALE, INC., Bankrupt.

### TRANSCRIPT OF PROCEEDINGS

Portland, Ore., Sept. 13, 1954, 2:00 p.m.

Be it remembered that, on this 13th day of September, 1954, at the hour of 2:00 p.m. thereof, the hearing on Trustee's objections to allowance of claim of The First National Bank of Portland and petition for order of payment of bank account to Trustee came regularly on for hearing before the Referee in Bankruptcy, the Honorable Estes Snedecor.

The Trustee appeared by Mr. E. A. Boyrie, his attorney; the claimant, The First National Bank of Portland, appeared by Mr. W. H. Pendergrass, of Messrs. Pendergrass, Spackman & Bullivant, its attorney.

Thereupon the following proceedings were had:

The Referee: All right, Gentlemen. Mr. Boyrie. We can get at the evidence as quickly as possible. I have read the pleadings on it.

Mr. Pendergrass: If the Court please, I have one correction to the pleadings. On Page 2 of our answer on Line 5 it reads "July 25th." It should be "July 26th."

Mr. Boyrie: Well, if it is agreeable to the Court

and counsel I will just put my testimony on. I don't think there is going to be a great deal of difference between the parties in the facts and the testimony. I think there will be some difference in emphasis perhaps and inferences, but basically I think we are not going to be widely divergent on the facts.

The Referee: It is largely going to be a question of law, isn't it?

Mr. Boyrie: Yes, sir.

The Referee: That is the way it appeared to me, but you may proceed with the evidence.

Mr. Boyrie: Mr. Baines.

### ARTHUR B. BAINES

was thereupon produced as a witness in behalf of the Trustee herein, and, having been first duly sworn, testified as follows:

#### Direct Examination

Q. (By Mr. Boyrie): You acted as attorney for Northwest Variety Wholesale, Incorporated, in preparation of its petition in bankruptcy in this case, did you not?      A. That is correct.

Q. And you prepared its schedules in bankruptcy?      A. That is correct.

Q. And filed them. Had you been an attorney for the company before the preparation of these schedules in bankruptcy?

A. From its inception.

Q. And that would be from when, do you recall?

(Testimony of Arthur B. Baines.)

A. Oh, I think possibly 1948 or somewhere around there is when it was first organized.

Q. Let's go right down—these schedules were filed July 14, 1953. You acted as attorney for the corporation, then, in preparing its corporation papers and its charter?      A. Yes, sir.

Q. And any services that were required afterwards in permission to sell stock and minutes and the like?      A. Yes, sir, all of those.

Q. And the corporation continued in business up—let's come down to December, 1952. Can you tell us what condition developed with to the corporation in December, 1952?

A. Well, it was perhaps a month and a half before that, or two months, Mr. Boyrie, the corporation had prior to that time changed its operation from strictly a co-operative to more or less of a strictly wholesale variety stock upon the advice of this national firm of business consultants.

Then in the fall of 1952 the corporation found itself with a tremendous inventory, and of course the corresponding bills, which made it impossible to pay the bills. When we came up to, I believe it was about the first of November, 1952, the corporation had approximately \$85,000 indebtedness. I of course was called in on all of their meetings of the directors and I examined their various financial statements, and it was about this time, as I say, I think probably the first of November would be a closer period, when the balance sheet of the first of that month disclosed there was this indebtedness of

(Testimony of Arthur B. Baines.)

\$85,000 owing to approximately 158 creditors. But offsetting that was about \$135,000 or \$140,000 worth of inventory. I think that is generally about what the financial picture was.

Of course my opinion was asked for. I was very familiar with the organization and the stock, and an investigation disclosed that this was what is known as clean stock. In other words, the stock was all merchantable, but it did represent items, for instance, that could only be sold at Christmas-time, other items could only be sold the following year at, say, Valentine's Day and Mother's Day and the various holidays along the line, and of course a big school supply which wouldn't be able to be sold until the following fall. So I suggested to the Board of Directors in view of the fact that it was clean stock and in view of the fact that the basis of the organization, that is, the stockholders were still about forty or forty-five members, that the member stores if given an opportunity would be able to liquidate this stock, and instead of the stock being thrown on the market as salvage stock at that particular time, if we were able to sell the stock, the stockholders could probably get 100 per cent on the dollar. That was in my recommendation to the Board of Directors. Then in about the middle of January, starting January 15th, the corporation would pay 10 per cent a month to its creditors and any new purchases would be paid by cash. It would give us a full year cycle for the selling of stock. That was the recommendation I made about the end



(Testimony of Arthur B. Baines.)

of November, 1952. I was authorized by the Board of Directors to take whatever steps were necessary to see at that time if these steps could be put into force.

Q. At that time who was the largest creditor of the company?

A. The First National Bank of Portland. I believe it is the Industrial Branch.

Q. Did you contact The First National Bank with reference to such a plan as you have just outlined here now?      A. I did.

Q. Tell us about when and where that was and who was with you and so forth.

A. After being authorized by the Board of Directors to proceed to see what could be done—of course, at that time, also, there were several large creditors. There was The First National Bank; there was a company I believe known as The East Tablet Corporation or some such name as that, to which I believe there was a \$13,000 indebtedness. There were certain other creditors who were threatening legal action at that time. Of course Mr. Ankrom was the general manager of the corporation, and it was my recommendation to Mr. Ankrom that we take the biggest creditors first. The biggest creditor was The First National Bank. It was previously told us that The First National Bank would not go on, but would force us into a petition in bankruptcy. At that time Mr. Ankrom suggested we go over and see Mr. Arthur Lynn, who at that time was and still is manager of the Industrial Branch



(Testimony of Arthur B. Baines.)

of The First National Bank. That was close to the first of December, 1952.

Mr. Ankrom and I went over. We discussed the matter with Mr. Lynn. We put our cards on the table just exactly as I have informed the Court here today, and asked Mr. Lynn his opinion of the plan and also whether or not The First National Bank would go along with us, being the first biggest creditor. We explained to Mr. Lynn obviously if he didn't go along with us we were stopped. We also asked Mr. Lynn for any suggestion he might have, we appreciated that his opinion might be worth something to us. We were there quite awhile and Mr. Lynn assured us the plan sounded feasible to him and The First National Bank would go along with us on the plan.

Q. Some importance may be attached here to exact words. Are you quoting Mr. Lynn's exact words in your opinion or are you drawing a conclusion from his words when you say that he said they would go along with the plan?

A. I would say, Mr. Boyrie, that that—of course, that was about two years ago, but that was substantially Mr. Lynn's wording, that he felt, too, as Mr. Ankrom and I did, that the plan was feasible and that the corporation could work out the financial difficulties, and that they would go along with us on the plan. That is substantially what was stated.

Q. Did you call personally on any other creditor, you personally?

(Testimony of Arthur B. Baines.)

A. No. You see, Mr. Boyrie, most of the creditors were outside of Portland. In other words, there were several in Seattle and several in San Francisco. Perhaps the largest majority were in New York or in the environs of New York. As I recall, the only two or three creditors that I talked to over the telephone were Johnson-Lieber, brokerage firm; there was a stationery house and the printing house. As I recall there were four local creditors.

But Mr. Lynn was the only one, The First National Bank, that I talked to personally, other than Mr. Ankrom, as I understand it, talked to many others personally.

Q. After this meeting which you have related with Mr. Lynn, what did you then do in furtherance of this plan of extension, let's call it, for the Northwest Variety Wholesale?

A. I then wrote a personal letter, an individual letter, to each of the creditors and outlined the plan to each of the creditors just as I have outlined it here today. Just set it out in chronological order what we hoped to do and what our recommendation was.

The Referee: Did you ask for consents or what did you do?

A. No, we didn't, your Honor. We put it on definitely a voluntary basis. In my correspondence I explained to each individual creditor that we were faced with a proposition of bankruptcy or attempting to liquidate this stock in orderly manner, that we were not asking for any written con-

(Testimony of Arthur B. Baines.)

sent, that we were just asking their tolerance and forbearance. That unless all the creditors strung along with us it meant bankruptcy, and in my opinion I felt it would be a tremendous loss to each of the creditors because I didn't feel that the stock under forced sale would bring very much money, so we just put it on a voluntary basis with all creditors.

Mr. Boyrie: I would like to have this marked for identification.

(Thereupon copy of letter addressed to Eastern Tablet Corporation, dated December 15, 1952, was marked Trustee's Exhibit No. 1 for identification.)

Q. This letter that is marked Trustee's Exhibit No. 1 was a copy of a letter addressed to the Eastern Tablet Corporation. That is the corporation you just mentioned a moment ago?

A. That is right.

Q. The second largest creditor?

A. The second largest creditor, I believe, yes.

Q. I believe the bank was twenty-two thousand?

A. That is correct.

Q. And I believe they were thirteen thousand?

A. I believe they were eleven thousand, thirteen thousand, or twelve thousand, somewhere in that vicinity.

Q. Is this a copy of the letter you wrote to the Eastern Tablet Corporation?

A. Yes, that is a copy of a letter to be sent December 15th.

(Testimony of Arthur B. Baines.)

Q. Is that the same form of letter which was to be sent to the other creditors of the corporation?

A. That is substantially the same letter that went to all the creditors. The only place where it varied, we did have letters, for instance, in some cases if I would be the attorney for various companies. In other cases it would be from certain creditors' agencies. In some cases by the time we started trying to reorganize, many of the creditors had just come out, "If we don't receive the money by such and such a date, we are going to start legal action." I had to vary the letter in that particular case, but outside of that variance, that is substantially the same type of letter that went out to all the creditors.

The Referee: You didn't use a circular letter?

A. No, no, your Honor.

The Referee: Did most of the creditors acquiesce, or did you have much trouble?

A. I would say after about the first month—I used to keep a day-to-day memo—at the end of the first month I had heard from, say, approximately 50 per cent of the creditors that they would go along with us. I would say perhaps 10 or 15 per cent were belligerent and antagonistic at that point, and after a month's time I would say there were 40 per cent of the creditors I hadn't heard from at all at that particular time.

Mr. Pendergrass: That was after a month, you said?

A. That is right, Mr. Pendergrass.

(Testimony of Arthur B. Baines.)

Mr. Boyrie: I offer this Trustee's Exhibit No. 1 in evidence.

The Court: It will be received.

(The copy of letter marked Trustee's Exhibit No. 1 for identification was offered and received in evidence.)

### TRUSTEE'S EXHIBIT No. 1

Eastern Tablet Corporation      December 15, 1952  
P.O. Box 1110, Albany, New York

Gentlemen:

I have been requested to write to you, as a creditor of my client, Northwest Variety Wholesale, Inc., regarding their present condition and proposed solution to remedy same.

Last Spring, upon the advise of a national firm of business consultants, my client increased their inventory far beyond their past normal business requirements. The promised sales promotion was not subsequently realized and my client then found themselves in the embarrassing position of a much greater inventory than could be readily liquidated. This was so, because much of the inventory was in seasonal merchandise which could not be liquidated in an orderly manner in time, less than a full year's business cycle.

Their financial position is sound only so long as their inventory can be sold in a normal manner. If it had to be quickly liquidated, considerable of it, would have only salvage value. Northwest Variety



(Testimony of Arthur B. Baines.)

Wholesale, Inc., has the same set up which they had during 1951, with the same sales expectancy.

My client has been in business since 1946, showing considerable gain from the start and except for the ill proven advise of said experts, this too would have been a good year.

After considerable study and investigation, my client has, I believe, justifiably come to the conclusion that if all creditors will be patient and cooperative for a definite period of time, that all will be paid in full, as well as retain a customer, whom I trust, has proven valuable and satisfactory in the past.

The proposed plan is as follows: If my client would be permitted to pay your account in ten equal monthly installments, starting with January 15, 1953, then they would continue operation and purchase merchandise on a cash basis. By Oct. 15, 1953, all accounts would be paid in full and all excess inventory would be liquidated.

We have taken this matter up with several of our local creditors, who have agreed with this plan, whole heartedly, as being a feasible plan, and justifiable, considering their past growth and record.

I will appreciate any consideration that you can give this matter and will be glad to furnish any further details upon request.

Very truly yours,

/s/ Arthur B. Baines

ABB:lje



(Testimony of Arthur B. Baines.)

The Witness: When we made our first 10 per cent payment in January, 1953, there were some forty-five or fifty creditors I hadn't heard from at that time, but the straight 10 per cent payment was made to all the creditors.

Q. (By Mr. Boyrie): You were asked about a circular letter. You stated you sent the same general letter to all creditors. You kept your initial letter, then, and any further correspondence in folders in your office?

A. That is correct.

Q. And according to the letters of the alphabet you put in each folder the correspondence with each particular creditor, is that right?

A. That is correct.

Q. You might clarify that. Is the file of your records with respect to the correspondence with these different creditors?

A. That is correct.

Q. Some of the creditors, I understand, came right back and said, "O.K." Some of them were quite complimentary, were they not?

A. Very much so.

Q. Said they were happy to go along with the program. Some said, "To heck with it," they were going to sue and attach right away?

A. That is right.

Q. Did you have some more correspondence from the people like that?

A. I would say from a dollar standpoint by the end of the first month we had the biggest percent-

(Testimony of Arthur B. Baines.)

age of the creditors who had agreed to go along with us. A great deal of trouble came from some of the small creditors who thought that, theirs being only a small amount, they should be paid up completely. They didn't want to fool around with a 10 per cent cut.

Q. You sent 10 per cent in January, February, March, April, and May, so that you paid a total of 50 per cent under that plan, is that right?

A. That is close, yes, sir.

Q. What was the condition in June?

A. In June actually what the situation was, we had anticipated that the current business would continue at a faster rate than actually developed. We had anticipated when the corporation went back more or less to the old way of doing business about the first of December, that is, on a co-operative basis, and judging from the past experience of the co-operative, we had anticipated that same business would come back into the corporation again. But it didn't, so there wasn't enough current business to keep the organization going, and along about what would be the sixth payment in June there wasn't enough money to make the sixth payment.

At that time we called a meeting of the stockholders to inquire whether the stockholders thought they should continue, whether they wanted to keep the corporation going on a co-operative basis, but by that time they were discouraged and decided they would just write it off at that time, and I was authorized then to file a petition of bankruptcy.

(Testimony of Arthur B. Baines.)

Q. During the time that the five months' dividends of 10 per cent each were paid, such dividend was paid each month to The First National Bank, wasn't it? A. That is correct.

Q. And to each of the other creditors?

A. Yes, sir.

Q. Did anybody during those five months take any steps to close the corporation up, that is, did anybody file suit or attachment against the corporation?

A. I believe there were two legal actions that were filed, or one was threatened and one was filed. I believe there are actually two but that was all and everybody else for about three months had accepted and were assuming that the plan would be completed. I would say after about the middle of April was the last trouble we had had.

The Referee: What did you do with those who didn't go along?

A. We gave a 10 per cent payment on the fifteenth of each month. Even if a creditor said he wouldn't accept it, we still sent him a 10 per cent payment. We wrote them a letter and told them, such as a certain creditor even though he didn't accept it, in view of the fact that we had stated we would pay out a 10 per cent payment, if he didn't want to cash the check, we were leaving it to his own discretion but we were still paying a 10 per cent dividend at that time.

Q. (By Mr. Boyrie): Then nobody questioned the 10 per cent?

(Testimony of Arthur B. Baines.)

A. After about the middle of April I don't think so, Mr. Boyrie. By the middle of April the creditors accepted it. Of course, I told them if they filed an action it would take about a year to get a judgment on it, and by that time it would all be paid out anyway.

The Referee: What did you do with the one that was filed? Did you file an answer?

A. We filed an answer with the firm of Goldstein, Galton & Galton. I contacted Mr. Galton and explained what the situation was. After the explanation his client went along with us. I believe it was the Sessions Clock account. Also Mr. Bonyhadi of Messrs. Rosenberg, Swire & Coan, was ready to file for his client, and I explained the situation to him and he recommended to his client to go along with the rest.

Q. (By Mr. Boyrie): You told us about the first conversation with Mr. Lynn. Were there any subsequent conversations with Mr. Lynn or any representatives of The First National Bank in which you participated?

A. I recall seeing Mr. Lynn on another occasion. It is possible it could have been two other occasions. I felt that Mr. Lynn was entitled to at least the courtesy of being kept advised as to the plan that was being made. I recall one time calling Mr. Lynn on the telephone and one other time—it is possible it could have been two other times that I talked with him personally when I was either going to the office at Northwest Variety or going back. I just



(Testimony of Arthur B. Baines.)

went in as a courtesy call and advised Mr. Lynn that the plan was working out on schedule as we anticipated, more or less to vindicate Mr. Lynn's feeling about the organization, as our own.

Q. You addressed no letter to the bank, did you?

A. No, I didn't because that was the first creditor we talked to and that was the first creditor to agree to it.

Q. You received no written commitments from the bank? A. No, sir.

Q. Nor did you ask for any formal statement from other creditors, did you? A. No.

Q. You did receive some commitments from them in answer to your letter?

A. That is correct.

Q. In the case of creditors who weren't satisfied with the showing made by your first letter or with the statement of your first letter, did you refer any of such creditors to The First National Bank?

A. Yes, I would say several—probably many would be more accurate—of the creditors who wrote out to us and asked us for further information, I believe I stated in some of my letters that we had discussed the matter with some of the large local creditors. I believe I used the term "creditor" or "creditors"—I used that little loosely—who had agreed to the plan. I received then letters from some of the creditors who wanted to know who some of these large creditors were whom we had discussed the plan with, who had accepted. So of course in each of those cases I referred them first

(Testimony of Arthur B. Baines.)

to The First National Bank and then I referred them to Johnson-Lieber and this local printing house, who was one of the local creditors too.

Q. You might refresh your memory from your file here, if you will. Did you refer the Eastern Tablet Corporation to The First National Bank?

A. That is correct, Mr. Boyrie.

Q. What did you tell them about The First National Bank?

A. I said the company was then sound with an inventory of over eighty thousand and with 158 creditors. "Our local banker who watched our condition on a weekly basis, after going over the proposed plan as written to you, felt that it was a feasible one and that my client would have no trouble in carrying through with it, and was one of the first to agree to go along with same." That is the end of the letter.

Q. How about the National Mask & Puppet Corporation? Did you refer them to The First National Bank?

Mr. Pendergrass: May I ask a question?

The Referee: Yes.

Mr. Pendergrass: I assume all of this has gone in to show that the bank agreed to the extension of the ten-month agreement as such. Is that *is* what you are aiming at?

Mr. Boyrie: It is rather doubtful that it shows that, Mr. Pendergrass. I will follow it up. I just want to show that Mr. Baines did refer creditors to The First National Bank, each one of these



(Testimony of Arthur B. Baines.)

creditors on which I have examined him to The First National Bank. If The First National Bank would argue Mr. Baines statement isn't correct, it probably is of little or no value, but I think at the present time it has some value.

The Witness: On February 18, 1953 in answer to Mr. Aaron C. Samuels of the National Mask & Puppet Corporation, I wrote him as follows: "Our largest creditor, The First National Bank, who have an unsecured loan in the sum of \$20,000, were the first to endorse this proposed plan, and I am sure that if you would care to write to Mr. Arthur Lynn, Manager of the Industrial Branch of said bank, that he would corroborate what I have stated herein."

Q. (By Mr. Boyrie): Do you offhand recall, to shorten this up, any other creditors whom you referred to The First National Bank?

A. I have no independent recollection of any others but I know there were several others whom I did refer to The First National Bank.

Q. How about Wooster Rubber Company? Here is a letter to Wooster Rubber Company.

A. Yes, on January 7, 1953 I wrote a letter to Mr. G. C. Neal, the General Manager of the Wooster Rubber Company. I state, "It is true that you are one of the larger creditors, there being several, however, larger, one being The First National Bank of Portland, Oregon, who, after a thorough investigation, were the first to agree with this plan."

Mr. Pendergrass: I am quite willing to concede

(Testimony of Arthur B. Baines.)

that Mr. Baines was of the opinion that the bank agreed. It makes no difference to me. You can keep on with it.

Mr. Boyrie: I will go on to something else.

Q. (By Mr. Boyrie): Do you know if any of those creditors ever made inquiry at The First National Bank?      A. That I do not know.

Mr. Boyrie: I think that is all.

### Cross Examination

Q. (By Mr. Pendergrass): Going back, Mr. Baines, to your conversation with Mr. Lynn in December where you and Mr. Ankrom and Mr. Lynn were present, you said that you understood from the substance of the conversation that Mr. Lynn felt that the plan was feasible and that the bank would go along with the plan. Was that the understanding you acquired from the conversation, or can you particularize as to the words that were used?

A. I felt, Mr. Pendergrass, that I was giving the substance of the exact conversation as I remember it at this time.

Q. You are not attempting to quote the conversation as such?

A. I was attempting to quote the conversation as close as I could recall it at this time.

Q. Do you mean to say, then, that those were the words that were used, or that that was your best recollection of what was said?

(Testimony of Arthur B. Baines.)

A. In my opinion those were substantially the words that were used by Mr. Lynn.

Q. Did you make any memoranda of the conversation at that time?      A. Not a bit.

Q. When was the first time that the necessity of recalling that conversation was called to your mind?      A. Just today.

Q. So you have not thought about the situation regarding that since December of 1952?

A. No, that isn't exactly true. As a matter of fact, Mr. Pendergrass, when this first started in December, this was almost a constant situation. This was a fighting situation to get 158 creditors to accept the plan. Of course Mr. Lynn's opinion, what he felt about it and what he told us, was of the deepest interest. As a matter of fact, many of the things I have told you, today is the first time I have looked at those things that I wrote about at that time, but this 158 letters and 158 creditors, the entire situation, it is just one of the things. There was so much. I can almost recall Mr. Lynn sitting at his desk. I was sitting on this side (indicating) and Mr. Ankrom on the other side, and we went over this financial statement. It was a very important thing.

Q. You have not had specific occasion to refer to that in your own thinking until today as an event?

A. Mr. Boyrie, I think, called me up here several months ago and he may have asked me about that conversation. I don't think anybody else asked

(Testimony of Arthur B. Baines.)

me to particularly quote the words of what it was at this particular time.

Q. (By The Referee): You wrote these letters and said he had agreed to the plan?

A. That is right; that is correct.

Q. You weren't lying to them, were you?

A. I certainly was not. That is what I say, that is substantially the conversation I had with Mr. Ankrom and Mr. Lynn and myself.

Q. The bank did go along with the plan?

A. Yes.

Q. The note was due? A. Yes.

Q. Did they sue you? A. No, sir.

Q. Did they accept their money?

A. They accepted their money every month.

(Witness excused.)

The Referee: Anybody else?

Mr. Boyrie: Mr. Ankrom.

### DAVID E. ANKROM

was thereupon produced as a witness in behalf of the Bankrupt, and, having been first duly sworn, testified as follows:

#### Direct Examination

Q. (By Mr. Boyrie): Mr. Ankrom, you were the secretary-treasurer and manager of the bankrupt corporation, the Northwest Variety Wholesale, Inc., were you not?

A. That is right.

(Testimony of David E. Ankrom.)

Q. And had you so been ever since it was started?      A. Right.

Q. We won't repeat regarding the history of the corporation. Let's come down to this period of the first time that you met with Mr. Lynn as representative of the First National Bank. Do you recall that occasion?      A. Yes, substantially.

Q. You went to the bank with Mr. Baines?

A. Right.

Q. For the purpose of talking to Mr. Lynn regarding the troubles of the corporation?

A. That is right.

Q. And the feasibility of this plan?

A. Yes, sir.

Q. Now, tell us your recollection as to what happened at that time.

A. As I can recall the plan was presented to Mr. Lynn. It was presented on the basis of payment once every month for a twelve-month period. The suggestion was made that it wasn't thought that the creditors would go along with payments strung over that long a period of time and that they should be reduced to a ten-month basis.

Q. Let me get that straight. Who suggested they should be reduced?      A. Mr. Lynn.

Q. Mr. Lynn?      A. Yes.

Q. When you originally proposed the plan it was on a twelve-month basis?

A. That is right.

Q. Then what happened?



(Testimony of David E. Ankrom.)

A. I can't recall the words of the conversation but in effect Mr. Lynn agreed not to interfere.

Q. Not to interfere with what, Mr. Ankrom?

A. In other words, not to foreclose or press us for payment if we were continuing to pay as we went along.

Q. That is if you were continuing to make these 10 per cent monthly payments, you mean?

A. Substantially that is what we had agreed to do.

Q. Perhaps we jumped into that a little too quickly. Before you came to that point had you discussed the financial affairs? Did you have a balance sheet with you?

A. I don't recall whether we had one with us at that particular time or not.

Q. But at other times you had been over your balance sheet with him?      A. Yes.

Q. Did you after this first time have any further conversations with Mr. Ankrom about the working of this plan?

A. You mean with Mr. Lynn?

Q. With Mr. Lynn.

A. Yes, I think from time to time. Of course I was in the bank periodically. I can't recall that a special trip was made for that purpose but there was often a word of greeting with Mr. Lynn, who has been very friendly. We belong to the same Kiwanis group, did at that time. There often was a casual "How is it going?" and a reply.

Mr. Boyrie: I think that is all.



Mr. Pendergrass: I have no questions.

(Witness excused.)

Mr. Pendergrass: Mr. Lynn.

ARTHUR W. LYNN

was thereupon produced as a witness in behalf of the Claimant herein, and, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Pendergrass): Will you identify yourself?      A. Arthur W. Lynn.

Q. What is your position with the bank?

A. I am vice-president and manager of the Industrial Branch.

Q. Did the Northwest Variety Wholesale have an account at the bank, the Industrial Branch?

A. Yes.

Q. When was that account established?

A. It was originally established in 1946, July, I believe, under the name of—let's see, it was established at one of the other branches, incidentally, under the name of Northwest Buyers, I believe it was originally. It was subsequently changed.

Q. When was it changed, do you recall?

A. It was changed to Northwest Variety Wholesale. I believe our advise is dated July 16, 1951.

Q. I will hand you a photostatic copy of a letter and ask if you will refresh your recollection.

A. July 16, 1951.

Mr. Pendergrass: This is just to establish the

(Testimony of Arthur W. Lynn.)

opening of the account and the name it appeared under.

(Thereupon photostatic copy of signature card of Northwest Variety Wholesale, Inc., was marked Claimant's Exhibit No. 2 for identification, offered and received in evidence.

Photostatic copy of letter dated June 16, 1951, addressed to First National Bank of Portland, was marked Claimant's Exhibit No. 3, offered and received in evidence.

Photostatic copy of signature card of Northwest Buyers & Distributors and photostatic copy of minutes of Directors meeting of Northwest Buyers, Inc., was marked Claimant's Exhibit No. 4, offered and received in evidence.)

Q. What was the nature of the account that was established?

A. It was a commercial checking account.

Q. Was it at any time changed from a general commercial checking account? A. No.

Q. I asked you to prepare for me a summary of the activity of the account, the period beginning January, 1951 until the date the account was closed, showing the high balance and the low balance for each month and the number of checks which were presented each month. Is this the summary which you prepared? A. That is correct.

Q. I asked you also to obtain the bank duplicate copies of the statements of the account for the months of December, 1952 until the account was ultimately closed.

(Testimony of Arthur W. Lynn.)

Mr. Pendergrass: If the Court please, I have the originals and I have some copies. I would prefer to submit the copies and put the copies in evidence.

The Referee: They are true copies?

Mr. Pendergrass: They are true copies.

The Referee: All right, admit it.

Q. (By Mr. Pendergrass): Are these copies of those original statements?

A. Yes, those are copies.

The Referee: They will be received.

(Thereupon summary of bank account of Northwest Variety Wholesale, Inc., was marked Claimant's Exhibit No. 5, offered and received in evidence. Copies of bank statements of Northwest Variety Wholesale, Inc., were marked Claimant's Exhibit No. 6, offered and received in evidence.)

#### CLAIMANT'S EXHIBIT No. 5

| Month        | High<br>Balance | Low<br>Balance | No. of<br>Checks |
|--------------|-----------------|----------------|------------------|
| January 1951 | 21,572.10       | 16,662.98      | 89               |
| February     | 18,396.38       | 3,658.50       | 251              |
| March        | 16,157.70       | 524.59         | 268              |
| April        | 17,972.29       | 8,199.87       | 280              |
| May          | 25,763.65       | 5,824.45       | 344              |
| June         | 14,550.24       | 379.13         | 234              |
| July         | 19,191.99       | 4,124.72       | 320              |
| August       | 20,490.80       | 885.96         | 268              |

| Month          | High<br>Balance | Low<br>Balance | No. of<br>Checks |
|----------------|-----------------|----------------|------------------|
| September 1951 | 31,203.09       | 10,626.92      | 178              |
| October        | 23,023.69       | 7,758.55       | 358              |
| November       | 9,468.58        | 412.61         | 258              |
| December       | 20,036.43       | 2,728.94       | 240              |
| January 1952   | 6,792.69        | 2,865.43       | 173              |
| February       | 22,963.41       | 3,348.67       | 184              |
| March          | 23,470.55       | 1,522.10       | 301              |
| April          | 32,281.99       | 46.81          | 271              |
| May            | 19,589.32       | 1,471.72       | 302              |
| June           | 3,600.79        | 75.76          | 124              |
| July           | 26,079.00       | 1,437.18       | 216              |
| August         | 18,205.86       | 6,692.63       | 258              |
| September      | 15,754.58       | 3,007.32       | 171              |
| October        | 14,853.38       | 2,505.35       | 214              |
| November       | 13,285.75       | 7,621.16       | 143              |
| December       | 22,328.59       | 7,420.28       | 135              |
| January 1953   | 25,897.57       | 16,689.42      | 172              |
| February       | 21,842.82       | 8,382.70       | 119              |
| March          | 10,120.79       | 481.05 OD      | 271              |
| April          | 9,417.67        | 1,214.38       | 205              |
| May            | 9,400.16        | 856.44         | 147              |
| June           | 3,250.44        | 955.01         | 84               |
| July           | 3,489.14        | 25.93          | 7                |

Q. (By Mr. Pendergrass): Were the funds in that account at all times subject to the limit of the checking of the depositor? A. They were.

Q. Was there at any time any restriction placed on the right of the depositor to withdraw any funds? A. No.

(Testimony of Arthur W. Lynn.)

Q. Do you recall the occasion of the discussion which Mr. Baines and Mr. Ankrom both refer to?

A. Yes, I do.

Q. What was the substance of the conversation as you recall it?

A. As they have related, Mr. Baines and Mr. Ankrom came in and presented the condition they found themselves in and asked us to go along. It is true they did first suggest a twelve-month payment program and I believe they wanted to make quarterly payments. I told them I would not accept quarterly payments, that we wanted to take a look each month and we would go along on a month-to-month basis. We expected a report of their program each month.

Q. Did you agree to a ten-month extension?

A. I didn't agree to a ten-month extension. I agreed to go along on a month-to-month basis and if I considered conditions were acceptable each month, to accept a 10 per cent monthly reduction.

Q. Were payments made in accordance with this understanding?      A. Yes.

Q. How many payments?

A. There were five payments made.

Q. What was the amount of each payment?

A. Twenty-two hundred dollars.

Q. Was this sum applied to the indebtedness?

A. Yes, that was \$2,200 principal plus the interest each month.

Q. At the time the petition in bankruptcy was filed, what was the amount owing?



(Testimony of Arthur W. Lynn.)

A. Eleven thousand dollars.

Q. I hand you a copy of the claim of The First National Bank, which is in the pleadings, and ask if you can tell what the accrued interest at that time was.

A. The accrued interest was \$73.33.

Q. When were you first advised that Northwest Variety Wholesale was considering bankruptcy?

A. It was the very last of June, as I recall it, when Mr. Ankrom told me they were considering it. He told me their directors were meeting to consider what steps to take.

Q. Did you prepare a memorandum at the request of Mr. Zollinger of your then recollection of this conversation and what followed it?

A. Yes.

Q. I'll hand you your file, which contains in it a memorandum. Is that your signature?

A. That is right.

Q. Would you look at that and tell me what the date is there, which indicates the date that you first recalled hearing about impending bankruptcy?

A. I shall read the paragraph in that letter: "On about June 20th a former employee who had been released previously in the process of curtailing expenses, told Ward Parker, who is an officer in our branch, while making a nominal payment, that the company was considering bankruptcy. We were unable to contact Ankrom for verification or denial of this that week, but about the end of June Ankrom indicated that their directors had decided

(Testimony of Arthur W. Lynn.)

that lack of volume would not justify their continuing to operate. Last Thursday, July 3rd, Ankrum was in the branch and told Mr. Parker that they were closing up and his salary was being terminated. Mr. Parker does not recall that he actually mentioned bankruptcy in the conversation."

Q. Will you read the next paragraph?

A. "On July 7th Arthur Baines, the attorney, came in and informed us he was preparing a petition in bankruptcy which would be filed when they had completed an inventory."

Q. What was the nature of the obligation which was owing the bank?

A. A promissory note.

Q. When was it due?

A. It was due—I will have to refresh my memory. I believe November of 1951. It was due November 10, 1951.

Q. Was any extension granted on the due day of that obligation?

A. No, there was no extension granted.

Mr. Boyrie: You don't mean 1951, do you?

A. 1952, pardon me. Yes, that is right, 1952.

Q. (By Mr. Pendergrass): Were you advised of any attachments or executions on any merchandise being made against the bankrupt?

A. No.

Q. Then did any creditor make any inquiry of you as to your reaction to this proposal?

A. I recall one indirect inquiry by telephone from a Portland bank on behalf of a correspondent

(Testimony of Arthur W. Lynn.)

bank in some other part of the country, I don't know where, in which they inquired what we knew of the condition of Northwest Variety Wholesale. I replied we had a past due obligation on which we were collecting monthly and we hoped it would work out.

Q. Did you state at that time that you had agreed to any ten-month extension or any other extension?      A. No.

Mr. Pendergrass: That is all.

#### Cross Examination

Q. (By Mr. Boyrie): Is it correct, like Mr. Ankrom stated, that he talked about the affairs of the corporation with you from time to time?

A. Mr. Ankrom brought their check in each month and told me of their program.

Q. This is after the liquidation?

A. Yes.

Q. At the time they were seeking to put this plan of payment into effect, did he discuss with you their financial condition?

A. Of course he and Mr. Baines discussed the financial condition at that time.

Q. That is that first time they came in?

A. Yes.

Mr. Pendergrass: That is the conversation of December?

Mr. Boyrie: Yes, in December 1952.

A. Yes.

(Testimony of Arthur W. Lynn.)

Q. You say they first had a plan they were going to make a 25 per cent payment quarterly?

A. Yes, I think that was their first proposal.

Q. You said the bank wouldn't go along with that?

A. Yes.

Q. It would go along with 10 per cent monthly?

A. On a month-to-month basis.

Q. Your note was due at this time?

A. That is right.

Q. You didn't demand payment of it at that time?

A. No, we did not.

Q. I think you show here your reason for producing these figures is to show there was enough money in their bank account to pay their note in full if you wanted to apply it.

A. There was from time to time. I cannot remember whether there was at the time of that particular discussion.

Q. But in any event, you hadn't any intention and you didn't apply it to the payment of your note?

A. No.

Q. Then you went ahead and received your January 10 per cent, didn't you?

A. Yes.

Q. And you were satisfied with conditions on January 10th?

A. I was hopeful, let us say.

Q. And you waited for your February payment. You certainly wouldn't have felt that you could have brought any legal action against them in February. It never occurred to you to bring any legal action against them in February, say, of 1953?

(Testimony of Arthur W. Lynn.)

A. It could have occurred to me to have offset the account at that time because the balances remained substantial at times during the month, and some months after that.

Q. You mean you could have done it in February and sometime afterward?      A. Yes.

Q. What I am asking is would you have felt that you were legally and morally entitled to file a suit against them in February?

A. If we saw fit, there was no reason why we shouldn't do it.

Q. No reason why you shouldn't do it. You wouldn't say, Mr. Lynn, that you said something like this to them: "Now, Mr. Baines and Mr. Ankrom, you cut this down to a monthly payment basis, 10 per cent a month, we will go along with you and take our 10 per cent a month, but, mind you, we can soon attach you anytime we want to"? Did you tell them something like that?

A. I did not use those words. I don't very often threaten people, but I did impress upon them, I am sure, in my opinion this was strictly on a month-to-month basis, that we could call it quits anytime we wanted to.

Q. Did they discuss with you when the plan was put into effect how they intended to liquidate the stock.

A. That they intended to liquidate it. They set forth the fact that it was seasonal inventory there that would have to be liquidated through the seasons. However, after I questioned them about their



(Testimony of Arthur W. Lynn.)

seasonal items, it appeared to me if they got their price out of the inventory it shouldn't take as long as they anticipated to move it, for as long as they were asking, shall we say.

Q. That is at the time you recommended they cut it down to the ten months?

A. That is the time I insisted they pay at least 10 per cent each month.

Q. In subsequent conversations did they tell you they had all the creditors in and were paying out the 10 per cent a month to all of them?

A. Yes.

Q. Then you got their payment regularly. You brought that out before, January, February, March, April and May.

A. That is right.

Q. Then you learned they were closing up in June?

A. Yes.

Q. When did they make this explanation of this setoff?

A. I believe that was July 14th. It is not on this sheet.

Q. You say you have no recollection of any correspondence from any creditor?

A. I can't remember any correspondence at all.

The Referee: Did you look at your correspondence file to see whether you wrote any letters on this?

A. Yes, I have looked through the file. I am sure I would remember any letters I have written.

The Referee: I would like to have you look through your file and let me know.

(Testimony of Arthur W. Lynn.)

A. Yes.

Q. (By Mr. Boyrie): You say you remember one telephone conversation?

A. One telephone call.

Q. Some bank was calling about some correspondent?      A. Right.

Q. You explained the plan to them and told them it worked out?      A. Yes.

Q. Did you tell them there was a general plan in effect?      A. No, I did not.

Q. You are sure of that?

A. I can't remember telling them about it because I had no first-hand knowledge of how concrete that plan was actually.

Q. (By the Referee): Didn't you obtain monthly statements from them?      A. No.

Q. When a company is in a condition like that, didn't you ask for monthly statements?

A. The company did not have enough personnel to prepare statements to be of any value.

Q. You had considerable confidence in Mr. Ankrom from a business angle?

A. Yes, I have.

Q. You were willing to accept his payments without asking for any formal report on how the liquidation was going?

A. That is right, I required no written report because with the restricted personnel they had down there in an effort to keep their overhead to a minimum, it was impossible for them to prepare inventories monthly.

(Testimony of Arthur W. Lynn.)

Q. And through May they said it was working out all right? A. Yes.

The Referee: Any other questions?

Mr. Boyrie: That is all.

### Redirect Examination

Q. (By Mr. Pendergrass): Would you look at the sheet and tell me what the balances were on December 16th and December 31st?

The Referee: I can look up those. I would like to finish this as quickly as possible. We won't try to have the arguments this afternoon.

Q. (By Mr. Pendergrass): Did you ever at any time agree to defer legal action against Northwest Wholesale?

A. I cannot say I agreed to defer legal action, no. I implicitly agreed probably to defer any action from month to month.

Mr. Pendergrass: That is all.

The Referee: Any other?

Mr. Boyrie: No.

(Thereupon at 3:30 p.m., September 13, 1954, the hearing in the above entitled matter was concluded.)

[Endorsed]: Filed February 25, 1955.

[Endorsed]: No. 14837. United States Court of Appeals for the Ninth Circuit. The First National Bank of Portland, a National Banking Association, Appellant, vs. Frank A. Dudley, Trustee in Bankruptcy of the Estate of Northwest Variety Wholesale, Inc., Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: July 19, 1955.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

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In the United States Court of Appeals  
for the Ninth Circuit

No. 14837

In the Matter of NORTHWEST VARIETY  
WHOLESALE, INC., Bankrupt.

#### STATEMENT OF POINTS ON APPEAL

The First National Bank of Portland, Appellant herein, files its Statement of Points on which it intends to rely on appeal herein as follows:

1. The United States District Judge for the District of Oregon erred as a matter of law in affirming the Order of the Referee Disallowing the Claim of The First National Bank of Portland unless the

sum set off by the Bank be surrendered to the Trustee, for the reasons that:

(a) The Referee's Conclusion of Law that the Bank waived its right to assert a set-off of the balance of the Bankrupt's account against the Bankrupt's indebtedness owing the Bank is not supported by the facts and is contrary to law.

(b) The Referee's Conclusion of Law that the Bank so conducted itself as to be estopped to assert its right to set off the balance in the Bankrupt's account against the indebtedness owing the Bank is not supported by the facts and is contrary to law.

(c) The Referee's Conclusion of Law that the bank account maintained by the Bankrupt with the Bank had, at the time of the exercise of the right of set-off, acquired the character of a trust fund and was therefore not available by the Bank to be set off against the Bankrupt's indebtedness owing it is not supported by the facts and is contrary to law.

(d) The Referee's Conclusion of Law that the claim of the Bank should be disallowed unless the sum of \$2889.14 which is the sum set off by the Bank against the Bankrupt's indebtedness owing it, is surrendered to the Trustee is not supported by the facts and is contrary to law.

2. The Findings of Fact made by the Referee and the transcript of testimony and exhibits establish that The First National Bank of Portland was authorized by the applicable statutes and the cases



construing the same to set off the balance in the general commercial account maintained by the Bankrupt with the Bank against the indebtedness owing by the Bankrupt to the Bank.

Dated this 25th day of July, 1955.

Respectfully submitted,

/s/ V. V. PENDERGRASS,

/s/ R. R. BULLIVANT,

/s/ WALTER H. PENDERGRASS,

Attorneys for Appellant The First  
National Bank of Portland

Acknowledgment of Service attached.

[Endorsed]: Filed July 26, 1955. Paul P. O'Brien,  
Clerk.